Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DIONNE LEE,

Petitioner,

v.

AESTHETECH CORPORATION; BRISTOL-MYERS SQUIBB COMPANY; THE COOPER COMPANIES, INC.; COOPER SURGICAL, INC.; CRONIN, THOMAS D., M.D.; CV SUB 1987, INC.; THE DOW CHEMICAL COMPANY; VIKI GALATI; GEROW, FRANK J., M.D.; MEDICAL ENGINEERING CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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2688

QUESTIONS PRESENTED

1. Whether the requirements of 28 U.S.C. § 1291 are satisfied so as to give jurisdiction to the Court of Appeals in a multiple claims and multiple parties case when the District Court entered a final judgment, which adjudicates less than all the claims and adjudicates less than all the parties.

2. Whether Congress has provided guideposts for determining what sorts of neglect will be considered "excusable" to convey the notion that some types of neglect – at a minimum focus on the reasons for the error with emphasis in its effect. Federal Rules for Appellate Procedure Rule 4(a)(5), 28 U.S.C.A.

3. Whether the Court's Order granting Petitioner's costs on appeal may be repelled and the mandate include the Respondents' costs after the Petitioner's uncontested motion for recovery of her costs was granted and entered in the Court's docket sheet and Petitioner timely filed the Bill of Costs within the 14 day period as prescribed by the Rule.

LIST OF PARTIES

1. Dionne Lee, f/k/a Dionne Lee Simons in the lower court
2. Aesthetech Corporation
3. Bristol-Myers Squibb Company, f/k/a Bristol-Myers Company
4. The Cooper Companies, Inc., f/k/a Coopervision, Inc.
5. Cooper Surgical, Inc.
6. Cronin, Thomas D., M.D.
7. CV SUB 1987, Inc.
8. The Dow Chemical Company
9. Viki Galati
10. Gerow, Frank J., M.D.
11. Medical Engineering Corporation

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit filed December 12, 2001.

OPINION BELOW

Dionne Lee v. Aesthetech Corporation; Bristol-Myers Squibb Company, f/k/a/ Bristol-Myers Company; The Cooper Companies, Inc., f/k/a/ Coopervision, Inc.; Cooper Surgical, Inc.; Cronin, Thomas D., M.D.; CV SUB 1987, Inc.; The Dow Chemical Company; Vicki [sic] Galati; Gerow, Frank J., M.D.; Medical Engineering Corporation, Unpublished Opinion, United States Court of Appeals for the Fifth Circuit, filed December 12, 2001, reprinted in the Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fifth Circuit were filed December 12, 2001. This Petition for Writ of Certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13(1) and (4). This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. § 1291 provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit)

shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

STATEMENT OF THE CASE

Petitioner filed a Silicone Gel Breast Implant lawsuit on July 31, 1992, in the 55th Judicial District Court, Harris County Texas (the "Consolidated Harris County Silicone Gel Breast Implant Litigation"). The suit was filed in state court against the Respondents and others for Strict Liability, Negligence, Gross Negligence, Fraud, Breach of Warranty, Res Ipsa Loquiter, Intentional and Negligent Infliction of Emotional Distress and Damages. On May 15, 1995, Dow Corning Corporation filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division. On May 24, 1995, The Dow Chemical Company filed a cross action in this instant case. On August 8, 1995, The Dow Chemical Company and Corning Incorporated filed a Joint Notice of Removal pursuant to 28 U.S.C. § 1452(a), removing the entire Civil Action and all of the claims and causes of action asserted, including without limitation all of the claims asserted against the Removing Defendants and other Defendants and any cross-claims or other claims asserted against any such parties. The Civil Action was removed to the United States Federal District Court for the Southern District of Texas – Houston Division. Within three months thereafter, the Civil Action was transferred to the United States Federal District Court for the Northern District of Alabama – Southern Division,

absent of seven parties. The transfer was via the Multi-District Litigation. The Original Petition was amended to include the left off parties. The Dow Chemical Company was severed and transferred to Michigan. In 1999, the Civil Action was remanded to the transferor court. (USDC – Houston). On August 18, 2000, Surgitek, Inc; Bristol-Myers Squibb Company, formerly known as Bristol-Myers Company; Cooper Surgical, Inc.; The Cooper Companies, formerly known as Coopervision, Inc.; CV SUB 1987, Inc.; Aesthetech Corporation; Medical Engineering Corporation; CVI Merger Corporation; and Viki Galati filed a motion to strike plaintiff's experts and a motion for summary judgment. After timely responses were filed, on December 7, 2000 the District Court granted the motions. (Appendix D); (Appendix E). On December 7, 2000, the District Court entered a Final Judgment (Appendix C). The Petitioner appealed to the Court of Appeals for the Fifth Circuit. The notice of appeal was dispatched with pre-paid postage and Certificate of Service to the U.S. Postal Service, overnight delivery to the Clerk, United States District Court for the Southern District of Texas – Houston Division, 515 Rusk Street, Houston, Texas 77002. The postal service guaranteed delivery by 3:00 p.m. Monday, January 8, 2001. An inquiry was made regarding the status of the appeal and the Petitioner was referred to the Court of Appeals for the Fifth Circuit. The Fifth Circuit, quoting language to the effect that the appeal was going through the normal jurisdictional review. By letter dated March 13, 2001, the Fifth Circuit docketed the appeal and enclosed a briefing notice directing the parties to include among other issues to be briefed the following: Whether the Notice of Appeal

filed on January 9, 2001 is timely from the final judgment entered on December 7, 2000. After briefs and motions were filed, the Fifth Circuit entered an Order on August 14, 2001, quoting to the effect that the Appellant's motion for Costs and Expenses on this appeal is granted (Appendix B). Federal Rules of Appellate Procedure 39(a). The entry was made on the docket sheet on August 14, 2001. On December 12, 2001, the Fifth Circuit filed the judgment and opinion; thereafter, the Petitioner filed the Bill of Costs that was entered on the Court's docket sheet on December 26, 2001. The Court relied on *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987), and *Nelson v. Toti*, 707 F.2d 170, 171-72 (5th Cir. 1983). In the Fifth Circuit's December 12, 2001 opinion, quoting to the effect that the appeal is untimely; thus the appeal is dismissed and all outstanding motions are denied (Appendix A). The Court determined that the opinion should not be published and is not precedent except under the limited circumstances set forth in the 5th CIR. R. 47.5; 5th CIR. R. 47.5.4. For some unexplained reason, the U.S. Postal Service delivered the notice of appeal to the Clerk on January 9, 2001, one day late.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this case meets the standard of the Supreme Court Rule 10(c). The Fifth Circuit decided what is characterized as a jurisdictional question under 28 U.S.C. § 1291 and costs under the principles, rules, and practice of equity under 28 U.S.C.A. Because of the importance of the issues determining appellate jurisdiction, equity costs, and conflicts

in judicial views on the subjects and because of the conflict in the Courts of Appeals over the meaning of "excusable neglect", it should be settled by this Court. For the reasons hereafter stated, the Fifth Circuit's judgment and opinion are erroneous and should not be allowed to stand on these important questions.

ARGUMENT

I.

Time For Appeal Does Not Run Against Party Aggrieved By Dismissal Until The District Court Enters A Final Judgment That Clearly Disposes Of The Entire Civil Action. Federal Rules of Civil Procedure, Rule 54(b), 28 U.S.C.A.

The Fifth Circuit failed to address jurisdiction under 28 U.S.C. § 1291 and relied on *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). The issue in that case was whether the document filed "clearly evinced the party's intent to appeal" and an examination of the case disclosed no effect notice of appeal. The appeal was dismissed for lack of jurisdiction. Federal Rules of Appellate Procedure Rule 4(a)(1), 28 U.S.C.A.

> This is not a case where the Petitioner failed to clearly evince intent to appeal under Federal Rules of Appellate Procedure Rule 4(a)(1), 28 U.S.C.A.

The Petitioner's document entitled "Notice of Appeal" was clearly evidence of the Petitioner's intent to appeal. The certificate of service attached to the notice of appeal clearly indicated that all parties were put on

notice. The Fifth Circuit lacked jurisdiction under Federal Rules of Civil Procedure, Rule 54(b), where the District Court failed to enter a final judgment. This was that Court's error, therefore the Fifth Circuit should have taken a different view to claim "lack of Jurisdiction". *Benson v. Bearb,* 807 F.2d 1228 (5th Cir. 1987); Federal Rules of Civil Procedure Rule 54(b), 28 U.S.C.A.; *Witherspoon v. White,* 111 F.3d 399 (5th Cir. 1997); 28 U.S.C. § 1291; *Thompson v. Betts,* 754 F.2d 1243, 1245 (5th Cir. 1985). Federal Rules of Civil Procedure Rule 54(b); Federal Rules of Appellate Procedure Rule 4(a)(1). This is the error of the Fifth Circuit and negates the notion that the Fifth Circuit lacks jurisdiction under Federal Rules of Appellate Procedure Rule 4(a)(1)(A). The time to appeal in this instant case has not begun to run. *Sears, Roebuck and Co. v. Mackey,* 76 S.Ct. 895 (1956); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978).

II.

The Court Of Appeals Have Divided In Their Interpretations Of "Excusable Neglect" Under The Federal Rules Of Appellate Procedure Rule 4(a)(5), 28 U.S.C.A.

The Fifth Circuit took no view on the appropriate standard to extend time. The Court relied on *Nelson v. Toti,* 707 F.2d 170, 171-72 (5th Cir. 1983). The issue in that case was whether Nelson's lack of notice of judgment by the Clerk should relieve the requirement of the late filing of the notice of appeal. In Nelson, the filing of the notice of appeal was delayed for 138 days. It was further stated, a party may move the District Court to excuse the delay

in filing a timely notice of appeal and a motion to excuse the delay is made no more than 30 days after the expiration of the 30-day period prescribed for filing the notice of appeal. The court dismissed the appeal where the filing of the notice of appeal was delayed for 138 days. Federal Rules of Appellate Procedure Rule 4(a), 28 U.S.C.A.; Federal Rules for Civil Procedure Rule 77(d), 28 U.S.C.A.

> This is not a case where the Petitioner attempted to file a notice of appeal after the initial 30-day period. This issue is where the Petitioner acted in good faith to perfect the appeal, and relied on the U.S. Postal Service for a timely delivery of the notice of appeal. Not only did the postal service fail to complete the task timely, there was no explanation for the delay in the delivery.

The Fifth Circuit's December 12, 2001 opinion indicated that the appeal was dismissed and all outstanding motions are denied. (Appendix A). The Court, quoting language to the effect that no motion was filed that would affect the running of the 30-day period. Federal Rules of Appellate Procedure 4(a)(4)(A). Her appeal is untimely; we lack jurisdiction.

This is the Fifth Circuit's error. If the notice of appeal was timely filed within the 30-day period after the entry of the final judgment, the appeal would be premature. Federal Rules of Civil Procedure Rule 54(b), 28 U.S.C.A. Therefore, any motions to extend time to file the notice of appeal before or after the prescribed 30-day period would be moot; thus there was no mistake or neglect by the Petitioner, excusable or otherwise. If the District Court had properly entered a final judgment and Rule 4(a)(5)

Federal Rules of Appellate Procedure was an issue, the Court must determine the appropriate standard for an extension of time to file the notice of appeal.

The Courts of Appeals are divided in their interpretations of "excusable neglect" as found in Rule 4(a)(5). Some Courts require a showing that the movant's failure to meet the deadline was beyond its control. *650 Park Ave. Corp. v. McRae*, 836 F.2d 764, 767 (2d Cir. 1988); *Pratt v. McCarthy*, 850 F.2d 590, 592 (9th Cir. 1988). Others adopted a more flexible approach. *Lorenzen v. Employees Retirement Plan of Sperry-Hutchinson Co.*, 896 F.2d 228, 232-233 (7th Cir. 1990). The Courts of Appeals have been similarly divided in their interpretations of "excusable neglect" under Rule 9006(b)(1), Federal Rules of Bankruptcy Procedure, 11 U.S.C.A. Several Courts of Appeals have taken a narrow view of "excusable neglect" requiring a showing that the delay was caused by circumstances beyond the movant's control. *In re Davis*, 936 F.2d 771, 774 (4th Cir. 1991); *In re Danielson*, 981 F.2d 296, 298 (7th Cir. 1992); *Hanson v. First Bank of Southern Dakota, N.A.*, 828 F.2d 1310, 1314-1315 (8th Cir. 1987); *In re Analytical Systems, Inc.*, 933 F.2d 939, 942 (11th Cir. 1991). When Courts depart from the language of a congressional command, they often create unintended difficulties in the process. If Congress had intended to depart from the accepted meaning of excusable neglect – supplementing its exclusive focus on the reason for the error with emphasis on its effect – surely it would have indicated. At the threshold there is but one question on which to focus: the reason the deadline was missed. *Pioneer Investment Services Company v. Brunswick Associates*, 113 S.Ct. 1489, 1505 (1993).

When a deadline is missed, as in this instant case, for some unexplained reason, there was no mistake by the Petitioner, excusable or otherwise; rather there was inexcusable neglect by the U.S. Postal Service for failure to transmit an adequately addressed envelope to the District Court on time. *Scarpa v. Murphy*, 782 F.2d 300 (1st Cir. 1986), reversed.

III.

The Mandate Issued By The Court Of Appeals Is Insufficient And Different With The Spirit And Terms Of The Court's Order In Granting Petitioner's Costs On Appeal.

The leading case on this issue is *Kansas City Southern Ry. Co. v. Guardian Trust Co., et al.*, 281 U.S. 1, 50 S.Ct. 194 (1930). It holds that equity costs not otherwise governed by statute are given or withheld in the Court's sound discretion. 281 U.S. at 194. The Court goes on to state the following:

> Equity costs are given or withheld in the sound discretion of the court according to the facts and circumstances of the case.

The District Court entered a final judgment that was not final, therefore not appealable. The District Court entered a final judgment that failed to address the issue of The Dow Chemical Company's cross-action. *Thomas v. Basham*, 931 F.2d 521 (8th Cir. 1991). The Fifth Circuit granted and entered on the Court's docket sheet the Petitioner's uncontested motion for her recovery of costs and expenses on the appeal (Appendix B). The Petitioner filed the Bill of Costs within the 14-day period prescribed

by the Rule. On December 26, 2001, it was entered on the Fifth Circuit's docket sheet. The Petitioner's recovery for costs on appeal is granted then repelled by the Fifth Circuit. All of these factors taken together place a person such as Petitioner under a life-time cloud.

CONCLUSION

For the foregoing reasons, Petitioner Lee respectfully prays that a Writ of Certiorari issue in this case.

Dated: March 8, 2002

Respectfully submitted,

DIONNE LEE

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20060

Conference Calendar

DIONNE LEE, formerly known as Dionne Lee Simons,

Plaintiff-Appellant,

versus

THE DOW CHEMICAL COMPANY ET AL.,

Defendants,

THE DOW CHEMICAL COMPANY; THOMAS D. CRONIN, M.D.; FRANK J. GEROW, M.D.; AESTHETECH; BRISTOL-MYERS SQUIBB, INC.; THE COOPER COMPANIES; COOPERSURGICAL; CV SUB 1987; VICKI [sic] GALATI: MEC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-95-CV-9401

(Filed Dec. 12, 2001)

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Dionne Lee seeks to appeal the summary-judgment dismissal of her lawsuit. This court must examine the basis of its jurisdiction on its own motion if necessary. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). Lee's notice of appeal was filed more than 30 days after the entry of the judgment she seeks to appeal. Fed. R. App. P. 4(a)(1)(A). Lee filed no motion that would affect the running of the 30-day period. Fed. R. App. P. 4(a)(4)(A). Consequently, her appeal is untimely and we do not have appellate jurisdiction. *See Nelson v. Foti*, 707 F.2d 170, 171-72 (5h Cir. 1983). Because we lack jurisdiction, Lee's appeal is DISMISSED and all outstanding motions are DENIED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20060

DIONNE LEE, formerly known as Dionne Lee Simons

Plaintiff-Appellant

v.

THE DOW CHEMICAL COMPANY; CORNING INC; THOMAS D CRONIN, MD; FRANK J GEROW, MD.; AESTHETECH; BRISTOL-MYERS SQUIBB INC; THE COOPER COMPANIES; COOPERSURGICAL; CV SUB 1987; VICKI [sic] GALATI; MEC

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Aug. 14, 2001)

Before HIGGINBOTHAM, WEINER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellant's motion for summary reversal is denied.

IT IS FURTHER ORDERED that Appellant's motion for remand is denied.

IT IS FURTHER ORDERED that Appellant's motion for instruction to the District Court to impose sanctions and disciplinary actions upon Bristol-Meyers [sic] Company, its counsel, and counsel for the "other appellees", Doctors Gerow and Cronin is denied.

IT IS FURTHER ORDERED that Appellant's motion for cost and expenses on this appeal is granted.

APPENDIX C

[LOGO]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIONNE LEE,	§	
PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO.
SURGITEK, INC., ET AL.	§	H-95-9401
DEFENDANTS.	§	

FINAL JUDGMENT

Pursuant to the orders striking the plaintiff's experts and entering summary judgment, the plaintiff shall take nothing by her suit.

This is a Final Judgment.

Signed this 7th day of December, 2000.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIONNE LEE	§	
	§	C.A. NO. H-95-9401
VS.	§	
	§	
SURGITEK, INC.; ET AL.	§	

ORDER

ON THE 7th day of December, 2000, came on to be heard Defendants, SURGITEK, INC, BRISTOL-MYERS SQUIBB COMPANY, formerly known as BRISTOL-MYERS COMPANY, COOPER SURGICAL, INC., THE COOPER COMPANIES, INC., formerly known as COOPERVISION, INC., CV SUB 1987, INC., AESTHETECH CORPORATION, MEDICAL ENGINEERING CORPORATION, CVI MERGER CORPORATION, and VIKI GALATI'S, Motion to Strike Plaintiff's Experts. The Court having considered said motion, heard argument of counsel and reviewed the record in its entirety, is of the opinion that said motion should be granted. It is, therefore,

ORDERED, ADJUDGED AND DECREED that based on the failure by Plaintiff to comply with Federal Rule of Civil Procedure 26 (2), and because Plaintiff's experts do not meet the requirements of *Daubert*, Defendants' Motion to Strike Plaintiff's Experts is granted. It is further

ADJUDGED AND DECREED that Plaintiff shall not be allowed to offer at the time of trial any testimony, by

records or live appearance, from any of the aforementioned experts.

SIGNED this 7th day of December, 2000.

/s/ Kenneth M. Hoyt
JUDGE PRESIDING

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIONNE LEE	§	
VS.	§	C.A. NO. H-95-9401
	§	
SURGITEK, INC.; ET AL	§	

ORDER

ON THE _____ day of _____, 2000, came on to be heard Defendants, SURGITEK, INC. BRISTOL-MYERS SQUIBB COMPANY, formerly known as BRISTOL-MYERS COMPANY, COOPER SURGICAL, INC, THE COOPER COMPANIES, INC., formerly known as COOPERVISION, INC., CV SUB 1987, INC., AESTHETECH CORPORATION, MEDICAL ENGINEERING CORPORATION, CVI MERGER CORPORATION, and VIKI GALATI'S, Motion for Summary Judgment. The Court having considered said motion, heard argument of counsel and reviewed the record in is entirety is of the opinion that said motion should be granted. It is, therefore,

ORDERED that Defendants, SURGITEK, INC, BRISTOL-MYERS, SQUIBB COMPANY, formerly known as BRISTOL-MYERS COMPANY, COOPER SURGICAL, INC, THE COOPER COMPANIES, INC., formerly known as COOPERVISION, INC., CV SUB 1987, INC., AESTHETECH CORPORATION, MEDICAL ENGINEERING CORPORATION, CVI MERGER CORPORATION, and VIKI GALATI, shall have judgment rendered in its

favor and shall stand fully released, discharged and acquitted of any and all claims of the Plaintiff made the basis of this suit. Costs of court are taxed against Plaintiff. All relief not expressly granted herein is expressly denied.

SIGNED this 7th day of December, 2000.

/s/ Kenneth M. Hoyt
JUDGE PRESIDING